

DECISION



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**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

PL-1
Vickers

FILE: B-201931

DATE: July 7, 1981

MATTER OF: Castle Construction Company, Inc.

DIGEST:

Protest that contract clause regarding waiver and release of claims for equitable adjustments is unfair to contractors by requiring that all claims be presented at one time is denied as clause follows policy of DAR § 26-204 (1976 ed.) and does not constitute deviation from regulations or standard changes clause. Moreover, Board of Contract Appeals has allowed reservation of claim under protested clause and held that waiver only bars foreseeable, not unforeseeable, costs.

Castle Construction Company, Inc. (Castle), has protested the inclusion of the "Equitable Adjustments: Waiver and Release of Claims" clause in invitation for bids No. N62470-78-B-8135 issued by the Naval Facilities Engineering Command, Norfolk, Virginia.

The IFB, for the construction of a building at the Naval Station in Norfolk, contained the following clause:

"100. EQUITABLE ADJUSTMENTS: WAIVER
AND RELEASE OF CLAIMS (7-76)

"(a) Whenever the contractor submits a claim for equitable adjustment under any clause of this contract which provides for equitable adjustment of the contract, such claim shall include all types of adjustments in the total amounts to which the clause entitles the contractor, including but not limited to adjustments arising out of delays or disruptions or both caused by such change. Except as the parties may otherwise expressly agree, the contractor

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shall be deemed to have waived (i) any adjustments to which it otherwise might be entitled under the clause where such claims fail to request such adjustments, and (ii) any increase in the amount of equitable adjustments additional to those requested in its claim.

"(b) Further, the contractor agrees that, if required by the Contracting Officer, he will execute a release, in form and substance satisfactory to the Contracting Officer, as part of the supplemental agreement setting forth the aforesaid equitable adjustment, and that such release shall discharge the Government, its officers, agents and employees, from any further claims, including but not limited to further claims arising out of delays or disruptions or both, caused by the aforesaid change."

Castle argues that the above clause constitutes an alteration to the standard changes clause contained in the contract and requires the contractor to use a "crystal ball" to foresee all possible costs associated with a change order when subsequent change orders may compound the cost ramifications. The clause requires a contractor to place too many contingencies in his bid price to remain competitive. Through the use of the clause, Castle alleges the Navy is attempting to shield itself from the normal obligations of the Government under the changes clause.

The Navy contends that this clause places no greater burden on contractors than when the contractor is preparing his bid on a fixed-price construction contract and must use the same future cost estimating methods as in projecting the cost impact of a change order. Moreover, the clause has been the subject of several decisions of the Armed Services Board of Contract Appeals (ASBCA), which found that waiver of unsubmitted costs occurred.

We agree with the Navy that the clause is not unreasonable and find nothing improper in its use. Moreover, we view Castle's contention that it must use a "crystal ball" to formulate its claims to be unrealistic considering the manner in which the ASBCA has interpreted the clause.

As noted by the Navy, the ASBCA has held certain claims waived by the clause. CCC Construction Company, ASBCA 20530, 76-1 BCA 11805 (1976). However, the applicability of the clause to certain costs has been softened in other decisions. See Hedreen Co., ASBCA 20599, 77-1 BCA 12328 (1977), wherein rights may be protected by a written or oral reservation by the contractor. Also, in Molony & Rubien Construction Co., ASBCA 20652, 76-2 BCA 11977 (1976), the Board noted that the clause did not cover costs which were not reasonably foreseeable.

The protester has advanced the argument that this clause is no different than one considered in Morrison-Knudsen Company, Inc. v. United States, 397 F.2d 826 (Ct. Cl. 1968). Castle argues both clauses attempted to limit the normal coverage of the changes clause.

In Morrison-Knudsen, the contract included a clause which limited equitable adjustments the contractor could receive to only those which exceeded the estimated quantities by 25 percent or more. Therefore, on changes involving less than 25 percent, the contractor received nothing. The Court of Claims found that the clause was improper as it modified the changes clause to prevent the contractor from obtaining costs to which he would have otherwise been entitled.

We find this case not to be controlling here. The court found objectionable the denial of costs to which a contractor would have been entitled absent the clause. Here, no costs are denied but are required to be presented at one time.

Finally, Castle contends that this clause constitutes a deviation from the Defense Acquisition Regulation (DAR) standard changes clause which has never been adopted in accordance with the procedures

under DAR § 1-109, Defense Acquisition Circular No. 76-17, September 1, 1978. The Navy has responded that this clause follows the policy set forth in DAR § 26-204 (1976 ed.) and, therefore, does not constitute a deviation. DAR § 26-204 (1976 ed.) reads as follows:

"26-204 Complete and Final Equitable Adjustments.

"(a) Controversies sometimes arise in interpreting what the parties to a contract intended to include within the scope and terms of the supplemental agreement equitably adjusting changes. To assure that equitable adjustments are complete, contractors should make every reasonable effort to present to the Government all elements of adjustment arising out of the change order to which the equitable adjustment pertains. Supplemental agreements containing a release of claims should be made only after all such elements of adjustment have been presented and considered.

"(b) The following is a sample release for use in supplemental agreements:

Release of Claims

In consideration of the modification(s) agreed to herein as complete equitable adjustments for the Contractor's.....
.....(describe).....claims,
the Contractor hereby releases the Government from any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances giving rise to the aforesaid claims (except for:)"

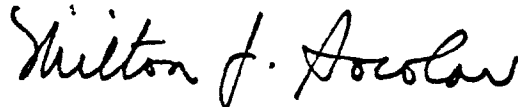
Castle argues that while the sample clause contains a space for listing items not agreed upon and the Navy clause states "except as the parties may otherwise agree" and, therefore, in principle, the clauses are similar, in

practice, the Navy's contracting officials refuse to allow any items to remain open.

What Navy personnel do in practice does not affect the validity of the clause or the fact that it does not appear to be a deviation from DAR. If a contractor is not satisfied with the equitable adjustment offered by the Government, the contractor should request a final decision from the contracting officer and follow the disputes clause procedures.

While Castle contends this places too great a financial burden on the contractor, this is a business judgment all contractors must make in negotiating claims with the Government.

The protest is denied.

A handwritten signature in cursive script, reading "Milton J. Arosow".

Acting Comptroller General
of the United States